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Mr. Jonathan Scheuer, Chair
And Commissioners
Land Use Commission
State of Hawaii
Department of Business, Economic Development & Tourism
P.O. Box 2359
Honolulu, Hawaii 96804-2359

RE: Department of Environmental Management, County of Maui's Comments on the October 8, 2020, Land Use Commission meeting agenda Item IX, on SP 97-390 COUNTY OF MAUI (CENTRAL MAUI LANDFILL) to consider LUC Staff request to issue errata to LUC Order for Fourth Amendment to State Special Permit for the Proposed Central Maui Landfill Facilities, dated August 13, 2020, to correct the number of acres subject to condition 23 and related findings of fact

Dear Chair Scheuer and Commissioners:

This testimony is in response to Action Item IX on of the Land Use Commission's ("LUC") October 8, 2020, meeting agenda. The Department of Environmental Management, County of Maui ("DEM") submits that there are procedural errors with Action Item IX, and additionally errors made during the LUC's consideration and dismissal of the State Office of Planning's ("OP") Motion for Reconsideration, filed on August 31, 2020, and joined by DEM and the County of Maui Department of Planning on September 17 and 18, 2020, respectively.

I. Procedural History

DEM timely filed its request to amend the Central Maui Landfill ("CML") Special Permit SP 97-390 ("SP") to (1) extend the time for the existing SP to October 31,

2028; (2) delete approximately 16.841 acres of land from the SP; and (3) include approximately 39.573 acres of land within the SP to allow uses directly related to the County's core solid waste management functions.

The application was heard by the LUC on July 8 and 9, 2020, during which hearing Commissioners posited whether a SP or district boundary amendment ("DBA") was the proper permitting vehicle for a landfill in the State Agricultural District. There was additional discussion and questioning on whether the proposed uses were distinct from the landfilling of waste and constituted separate industrial uses better suited for the Urban District. Both the OP and DEM provided support on the uses being directly ancillary to and an intrinsic part of DEM's core solid waste management functions, such that continuing the SP is the proper permitting vehicle.

Historically, the CML has utilized Agricultural District lands that have been previously quarried. As the quarry use ceases, the landfill has sought and obtained the LUC's approval to utilize the land for landfilling and waste diversion activities by way of special permit. Further, the CML was specifically sited due to its central location with respect to major population centers on Maui, as well as being situated in a rural/agricultural setting that *minimizes adverse impacts on urban areas*. As phases of the landfill have ceased active use, closure plans approved by the State of Hawaii Department of Health provide that the land is "covered" with earthen material.

Following the evidentiary portion of the hearing and during deliberations on DEM's request to amend the SP, Commissioner Giovanni put forth a condition of approval of the SP amendment that DEM seek a DBA within five years of the LUC's approval of the SP amendment. No particular area or acreage was specified in the motion.

On August 13, 2020, the LUC filed its *Findings of Fact, Conclusions of Law, and Decision and Order Approving with Modifications the Recommendation of the Maui Planning Commission to Approve a Fourth Amendment to the Land Use Commission Special Permit* ("D&O"), which adopted Commissioner Giovanni's proposed condition as Condition No. 23, which states:

That the Applicant shall commence the process to seek a district boundary amendment with the LUC for the approximately 22 acres of IAL within five years of the LUC's Decision and Order for the Applicant's Fourth Amendment Request.

On August 31, 2020, OP filed its Motion for Reconsideration of D&O Condition No. 23, requesting the LUC's clarification of the acreage subject to the DBA

requirement and deleting Condition No. 23. DEM filed its joinder to OP's motion on September 17, 2020, specifically in support of deletion of Condition No. 23 on the basis that a special permit is the proper permitting vehicle for landfills and directly related uses in the State Agricultural District.

On September 24, 2020, the LUC initiated the hearing on OP's Motion for Reconsideration and received OP's argument. Thereafter, following an executive session, the LUC moved to dismiss OP's Motion for Reconsideration for lack of jurisdiction due to untimely filing, pursuant to Hawaii Administrative Rules ("HAR") §15-15-84. OP requested to make a motion to amend its Motion for Reconsideration as a motion to amend pursuant to HAR §15-15-70, but was denied.

The applicant, DEM, and the County of Maui Department of Planning were not allowed to provide argument on the Motion for Reconsideration or OP's oral motion to amend.

Thereafter, the Executive Officer explained that the issue raised by OP as to the acreage subject to Condition 23 would be addressed via a request by LUC staff to the Commission for an "errata," which is Action Item IX on the October 8, 2020, LUC meeting agenda.

II. Arguments

Procedurally, "errata" should be used to correct only minor clerical errors. Review of the transcript of the LUC's July 9, 2020, hearing confirms that the acreage subject to the requirement to apply for a DBA within five years was not specified in the motion to impose the condition (See July 9, 2020, LUC hearing transcript, pp. 111-112). There is no support in the record for determining that a clerical or non-substantive error was made in the drafting or adoption of the D&O that could be addressed via errata. Indeed, the record does not provide sufficient basis for the determination of the Commission's intent to impose (or exclude the imposition of) the condition as to any portion of the Central Maui Sanitary Landfill.

The LUC's reconsideration of its adopted D&O, with respect to modifying the acreage subject to Condition 23, is substantive legally, economically, and practically. Requiring a DBA has immense economic considerations that the DEM referenced in its joinder to OP's Motion for Reconsideration, both in terms of the effects of the condition itself on the acreage subject to DBA, and additionally the economic considerations of requiring CML, and potentially the ripple effect of requiring the County's other landfills in Hana, Molokai, and Lanai,

to undergo the DBA and other entitlement processes, which may cost in excess of \$500,000 to \$1 million per site.

DEM submits that the LUC might rescind the decision to deny OP's Motion for Reconsideration or OP's oral motion to amend, based on its authority under HAR §15-15-70, thereby offering DEM, the Department of Planning, and OP to address concerns that were raised by the Commissioners in the September 24, 2020, hearing. DEM reiterates its concern for the effects of requiring a DBA for the landfill or portions of land used for solid waste management ancillary functions, emphasizes the immense economic and practical difficulties with such a requirement, and respectfully requests that the LUC reconsider its imposition of this condition.

Thank you for your consideration of our comments on Agenda Item IX.

Sincerely,

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First Deputy Corporation Counsel